



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 24, 1995

Mr. Kenneth Ramirez
Deputy Executive Director
Office of Legal and Regulatory Services
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-191

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26969.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for a commission file relating to the Brinkley-Anderson Landfill in Austin. You contend that certain documents are excepted under the attorney-client privilege as well as section 552.111 of the Government Code.

Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). This section does not protect facts or written observations of facts. Open Records Decision No. 615 (1993) at 5. Most of the documents you submitted for review contain factual information and thus may not be withheld under this exception. We have marked certain information containing advice, opinion, or recommendations relating to the policy functions of the commission that you may withhold from public disclosure under section 552.111.

In your request for an opinion, you state that certain documents are excepted from public disclosure because they fall within the attorney-client privilege. Although you cite section 552.111 of the act to support this proposition, the attorney-client privilege is properly considered under section 552.107(1). *See* Open Records Decision No. 574 (1990) at 2. Section 552.107(1) states that information is excepted from required public disclosure under section 552.107(1) if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

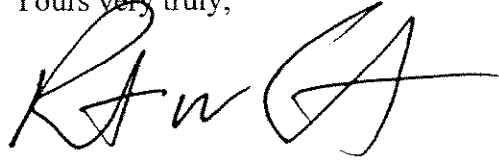
Although this exception appears to except information with rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to information within the attorney-client privilege. *Id.* at 4-5. Thus, the exception protects confidential client communications made to an attorney for the purpose of rendering legal advice. *Id.*; Open Records Decision No. 462 (1987) at 9-11. The exception also protects an attorney's legal advice or opinion. *Id.*

It is not apparent from the content of the documents you submitted, nor have you indicated, which information, if any, is an attorney's legal advice or opinion. Additionally, you do not indicate that any of the information was provided to an attorney for the purpose of rendering legal advice. Rather, you state that the commission's technical staff created and provided these documents to a committee, whose membership included attorneys, for a determination as to how the case should be handled. Thus, you have not met your burden of showing that the information is protected under the attorney-client privilege. Moreover, section 552.107(1) does not generally apply to factual information in investigative reports, even when prepared by an attorney. *See* Open Records Decision Nos. 462 (1987); 429 (1985); 230 (1979). This is so because when an attorney conducts an investigation, the attorney is acting as an investigator, rather than as an attorney or legal advisor. *See* Open Records Decision No. 462 (1987) at 11. Thus, you may not withhold any of the documents under section 552.107(1). *See id.*

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records.

If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'RWS', followed by a large, stylized flourish or initial.

Robert W. Schmidt
Assistant Attorney General
Open Government Section

RWS/MAR/rho

Ref.: ID# 26969

Enclosures: Marked documents

cc: Mr. Timothy W. Strickland
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(w/o enclosures)